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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, NOVEMBER 1, 2000

PETITION OF

COX VIRGINIA TELCOM, INC.,
Requesting Party,

CASE NO. PUC000212

v.

VERIZON VIRGINIA INC. f/k/a
BELL ATLANTIC-VIRGINIA INC.,
Responding Party

For declaratory judgment and
conditional petition for arbitration
of unresolved issues by the State
Corporation Commission pursuant to
Section 252 of the Telecommunications
Act of 1996 or alternative petition
for dismissal

ORDER OF DISMISSAL

On July 27, 2000, Cox Virginia Telcom, Inc. ("Cox"), filed its Petition for Declaratory Judgment and Conditional Petition for Arbitration or Alternative Petition for Dismissal ("Petition"). The Petition first requests the Commission to issue a declaratory judgment that the requested arbitration of interconnection terms and conditions between Cox and Verizon Virginia Inc. f/k/a Bell Atlantic-Virginia Inc. ("Verizon Virginia"), proposed conditionally by Cox, shall be conducted by this Commission pursuant to Section 252 of the Telecommunications Act of 1996, 47 U.S.C. § 151, *et seq.* ("the

Act"). If the Commission should not grant the declaratory judgment sought, then Cox requests that its Petition be dismissed.¹

Verizon Virginia, by counsel, filed a letter in response to the Cox Petition on August 16, 2000, averring that it was under no duty to respond in conformance with the requirements of Section 252(b)(3) of the Act because the Petition conditionally requested this Commission to arbitrate an interconnection agreement under the Act. Verizon Virginia maintains that the Act does not speak to conditional petitions, and that as the non-petitioning utility, Verizon Virginia is under no duty to file a response to Cox's conditional petition to arbitrate.

Cox filed comments on September 11, 2000, responding to Verizon Virginia's letter filed August 16, 2000. Cox points out in its comments that Verizon Virginia has filed no objection to the judgment sought by Cox declaring that the Commission proceed under the Act to arbitrate the interconnection agreement between Cox and Verizon Virginia. Cox also alleges in its comments that Verizon Virginia has failed to comply with our rules implementing Section 252 of the Act, 20 VAC 5-400-190 C 2.

¹ Cox seeks an express statement in the dismissal by this Commission "that it will neither take action on Cox's Conditional Petition for Arbitration nor act to carry out the responsibilities of State commissions under 47 U.S.C. § 252, so that the Federal Communications Commission ("FCC") might take jurisdiction over this arbitration pursuant to 47 U.S.C. § 252(e)(5). . . .".

The Commission finds that it cannot rule on the declaratory relief sought by Cox as such ruling might be considered an exercise of jurisdiction under the Act and, therefore, a waiver of the Commonwealth's sovereign immunity. We recognize that the attention drawn by Cox (i.e., its petition for declaratory judgment) to this jurisdictional matter is simply to anticipate being given the same choice offered to Cavalier Telephone, LLC, by our Order of June 15, 2000, in Case No. PUC990191. There, we allowed Cavalier either to pursue the resolution of interconnection issues under state law or to take its petition for arbitration under the Act to the Federal Communications Commission ("FCC").

As discussed in our Order of June 15, 2000, in Case No. PUC990191,² the Commission has authority under state law to order interconnection between carriers operating within the Commonwealth, and § 56-38 of the Code of Virginia authorizes us, upon request of the parties, "to effect, by mediation, the adjustment of claims, and the settlement of controversies, between public service companies, and their employees and patrons." Further, our rules codified at 20 VAC 5-400-180 as "Rules Governing the Offering of Competitive Local Exchange Telephone Service" anticipate that we would address

² Petition of Cavalier Telephone, LLC, For arbitration of interconnection rates, terms and conditions, and related relief, Document Control Center No. 000630199.

interconnection issues under the authority of the Virginia Code. Rules 20 VAC 5-400-180 F 5 and 6 specifically provide for our "arbitration" of contested matters. We stand ready to arbitrate this matter pursuant to these state authorities should Cox so request.

However, as evidenced by its Petition, Cox prefers to proceed with its arbitration of unresolved issues with Verizon before the FCC under the Act rather than before this Commission pursuant to 20 VAC 5-400-180 F 6 and other state authority. Cox has requested dismissal of its Petition in the event that this Commission does not proceed under the Act. We note that under present controlling federal authority,³ any action taken by us pursuant to 252(b) of the Act effects a waiver of the sovereign immunity of the Commonwealth. We previously have found no authority, and the parties here have suggested none, that would empower us to waive the Commonwealth's constitutional immunity from suit under the Eleventh Amendment to the U.S. Constitution. Until the issue of Eleventh Amendment immunity from federal appeal under the Act is resolved by the Courts of the United States,⁴ we will not act solely under the Act's federally

³ See GTE South Inc. v. Morrison, 957 F. Supp. 800 (1997); GTE South Inc. v. Morrison, 6 F. Supp. 2d 517, aff'd., 199 F. 3d 733 (4th Cir. 1999); AT&T of Virginia v. Bell Atlantic-Virginia, Inc., 197 F. 3d 663 (4th Cir. 1999).

⁴ The 4th Circuit currently has pending before it a case involving sovereign immunity, BellSouth Telecommunications, Inc. v. North Carolina Utilities

conveyed authority in matters that might arguably implicate a waiver of the Commonwealth's immunity, including the arbitration of rates, terms, and conditions of interconnection agreements between local exchange carriers.

Therefore, we will grant Cox's alternative request to dismiss this Petition so that it may proceed before the FCC. If Cox does proceed to the FCC, it shall be the responsibility of Cox to serve copies of all pleadings filed herein upon the FCC.

Accordingly, IT IS ORDERED THAT:

(1) This case is hereby dismissed pursuant to the laws of the Commonwealth of Virginia, without prejudice, consistent with the findings above. This Commission will not arbitrate the interconnection issues under federal law for the reasons given above.

(2) There being nothing further to come before the Commission this case is closed.

Commission, No. 99-1845(1), which was argued May 1, 2000. As of the date of this Order, the 4th Circuit has not ruled on this matter.